

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 285 OF 2023

IN THE MATTER OF COMPANIES ACT [CAP. 212 R.E. 2002]

AND

**IN THE MATTER OF AN APPLICATION FOR WINDING UP OF SALAMA
PHARMACEUTICAL LIMITED**

BETWEEN

CIPLA QUALITY CHEMICAL INDUSTRIES LIMITED.....PETITIONER

VERSUS

SALAMA PHARMACEUTICAL LIMITED.....RESPONDENT

RULING

13th February & 13th May, 2024

BWEGOGGE, J.

This is an application for the winding up of Salama Pharmaceutical Limited (respondent) commenced by CIPLA Quality Chemical Industries Limited (petitioner) for the alleged inability to pay an outstanding debt of USD 271,225.11. The petition was brought under sections 275, 279(1)(d) and (e),

and 281(1) of the Companies Act [Cap 212 R.E. 2002] and supported by the affidavit of Victor Serv Kessy, counsel for the petitioner, verifying the petition pursuant to rule 95(1) and 100(1) of G.N. No. 43 published on 11th February 2005.

The petitioner is represented by Victor Serv Kessy, learned advocate and the respondent had the services of Mr. Nazario Michael, learned advocate. The matter herein was argued by written submissions.

In elaborating the matters deposed in his supporting affidavit, the counsel herein submitted that the petitioner is a public company registered in Uganda on 07th October, 2016. And, the principal objects for which the company was established, among others, are manufacture, supply and sell of anti-retroviral (ARV), anti-malaria, hepatitis treatment and general pharmaceutical products. 25th February, 2014 the respondent made a purchase order number QCIL/1/2014 to the petitioner for the purchase of medicines namely, lumartem. Consequently, the petitioner manufactured the required product. Likewise, on 31st May, 2016, the respondent made another order vide No. QCIL/01/2016 whose value was USD 285,310. And, on 27th August, 2016 the petitioner delivered goods to the respondent worth USD 271,225.11. Since, 14th March, 2020 to date, the applicant has been

demanding the payment of the outstanding balance but the demands remain unheeded. Lastly, on 21st September, 2022 the petitioner issued a demand notice to the respondent requiring the payment of the outstanding sum of USD 271.225.11. However, the notice was not heeded by the respondent as well.

Thus, the counsel concluded that the respondent had not only failed to make full payment of the above-mentioned debt but also failed to come up with a payment plan to satisfy the claimed debt. Therefore, the respondent failed to pay the debt as per circumstances provided under section 279 (d) of the Companies Act. The case of **Board of Trustees of National Social Security Fund vs. M/S Kaitani Ltd** (Winding Up Cause 5 of 2021) [2022] TZHC 12528 was cited to substantiate the point.

On account of the above, the counsel prayed this court to be pleased to allow the application for winding up the respondent's company and appoint one Frank Mpossa as official receiver, among other prayers.

Contrarywise, Mr Nazario fiercely contested the application herein labelling it as an abuse of the court process. The gist of his contest is thus: **One**, the debt is disputed by the respondent and has not been established or approved

by the petitioner. The counsel contended that the amount claimed (USD 271,255. 11) originates from unpaid order No. QCIL/01/2016 as per tax invoice dated 22nd August, 2016. However, the release order attached indicates the amount due is TZS 606, 930, 840 but doesn't correspond to the order number mentioned above. Further, the counsel contended that the proof of delivery as per annexure CIPLA-5 purporting to be a supply order indicates that the amount claimed is USD 57, 061 only. The counsel opined that the petitioner was required to establish the alleged contractual debt and the inability of the respondent to pay the same before instituting this petition. And, as the petitioner has failed to establish that the respondent has failed to meet its day-to-day liabilities in the ordinary course of business, it follows that the suit herein has been commenced for the sole purpose of recovering the purported debt which is prohibited by law. The counsel cited the cases; **Dangote cement Limited vs. NSK Oil and Gas Limited** (Misc. Commercial Application 8 of 2020) [2020] TZHCComD 2052; **East African Development Bank vs Godes Limited** 1989] TLR 129 and **Tanganyika Plywood Limited vs. Amboni Paints Company Limited** (Misc. Application 19 of 2021) [2022] TZHCComD 112 to buttress the point.

Two, the parties herein had no contractual relationship and the same has not been established or proved by the petitioner. **Three**, for the year ending 2021 the respondent had a gross profit of TZS 9,123,205,608/= and a net profit of TZS 1, 090, 869, 472/= which is above and beyond the purported debt. Thus, on the above premises, the respondent's counsel asserted that the petition herein is patently misconceived; hence, should be dismissed with costs.

In rejoinder, the petitioner's counsel maintained his previous stance.

The issue for determination is whether the petition herein is merited.

The provisions of section 275 of the Companies Act enjoins this court with power to grant an order of winding up of the company registered in Tanzania. It is deposed by the applicant and conceded by the respondent that the respondent herein (Salama Pharmaceutical Limited) is a company incorporated in Tanzania. The provision of section 279(1)(d) of the Act provides that a company may be wound up by the Court **if it is unable to pay its debts**. The circumstances constituting the inability to pay debts are provided forth under section 280 the Act; *inter-alia*, if execution or other process issued on a judgment, decree or order of any court in favour of a

creditor of the company is returned unsatisfied in whole or in part; or if it is **proved to the satisfaction of the court that the company is unable to pay its debts** as they fall due; and, or if it is proved to the satisfaction of the court that **the value of the company's assets is less than the amount of its liabilities**. In the petition at hand, it is alleged that the respondent failed to pay the debt as per circumstances provided under section 279 (d) of the Companies Act.

I have keenly considered the rival submissions by both counsel herein. Admittedly, the alleged contractual relation between the parties herein is disputed. The reply to the demand notice and rejoinder thereto, speaks volumes in that there was no formal contract entered by the parties herein for the supply of the purported pharmaceutical products. The counsel for respondents vehemently contests the existence of the contract between the parties herein. In the same vein, it is needless to point out that the alleged contractual debt is contested as well. The respondent's counsel went further to assert that the annexures to which the debt amount refers, don't support the claim. Hence, it is obvious that the alleged breach of contract and claimed debt amount need proof before the order sought herein may be granted. And, this court is not a proper avenue for the petitioner to prove

the alleged breach of contract and contractual debt. The petitioner ought to institute a suit to that effect and come up with a decree of which, upon the respondent's failure to satisfy, the petition of like nature may ensue. At this juncture, I am unable to ascertain the alleged contractual debt through mere scrutiny of the documents annexed to the pleadings and written submissions filed in this court.

In the same vein, I would reiterate that though the provision of section 279(1)(d) of the Act provides that a company may be wound up by the Court if it is unable to pay its debts, yet the provisions of section 280 (d) and (c) of the Act impose conditions that it should be proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; and, or that the value of the company's assets is less than the amount of its liabilities. These conditions were the basis of the decisions of this court in the cases of **Dangote Cement Limited vs. NSK Oil and Gas Limited** (supra); and **Tanganyika Plywood Limited vs. Amboni Paints Company Limited** (supra).

Further, I would opine that the case of the **Board of Trustees of National Social Security Fund vs. M/S Kaitani Ltd** (supra) cited by the petitioner's counsel to buttress the petition herein is distinguished from this case. In the

relevant case, it was established to the satisfaction of the court that the liabilities of the respondent's company exceeded its assets; and that the same was issued with a decree emanating from the consent judgment with a decretal amount of TZS 14, 919, 681, 854 which was returned unsatisfied. I need not restate that the respondent's alleged debt in this petition not only is disputed but remains unsubstantiated as well. Arguably, I apprehend that in this matter there is genuine disputed debt on substantial grounds. Hence, the winding up order sought in this case cannot issue.

Given the foregoing reasons, I am constrained to agree with the respondent's counsel that the petition herein was misconceived. Consequently, I find the petition herein bereft of substance and dismiss the same. The respondent shall have her costs.

So ordered.

DATED at DAR ES SALAAM this 13th May, 2024.



O.F. Bwego
JUDGE